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56 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 USI Insurance Services LLC,

No. CV-23-00192-PHX-SMB

10 Plaintiff,

ORDER

11 v.

12 Alliant Insurance Services Incorporated, et
13 al.,

14 Defendants.

15 The matter before the Court stems from Plaintiff USI Insurance Services LLC's
 16 ("USI") lawsuit against Defendants Alliant Insurance Services Incorporated ("Alliant"),
 17 William J. Havard III, Robert Engles, Jenise Purser, and Justin Walsh (collectively,
 18 "Defendants," or without referring to Alliant, the "Individual Defendants") relating to
 19 allegations that, among other things, they engaged in the improper solicitation of USI's
 20 clients on Alliant's behalf after resigning from USI. Defendants move to exclude the expert
 21 opinions of USI's damages expert, Lynton Kotzin (Doc. 263 (Defendants' Motion to
 22 Exclude Certain Trial Testimony and Opinions of Lynton Kotzin)). The parties have fully
 23 briefed the Motion.¹ For the following reasons, the Court will **deny** Defendants' Motion.

24 **I. LEGAL STANDARD**

25 A party seeking to present an expert's testimony carries the burden establishing that
 26 testimony's admissibility. *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007). Federal
 27 Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)

28 ¹ The briefings for Mr. Kotzin are available at ECF Nos. 309 and 323. (See also Doc. 270;
 Doc. 302; Doc. 303 Doc. 324.)

1 govern the admissibility of such testimony. Rule 702 states:

2 A witness who is qualified as an expert by knowledge, skill, experience,
 3 training, or education may testify in the form of an opinion or otherwise if:
 4 (a) the expert's scientific, technical, or other specialized knowledge will help
 5 the trier of fact to understand the evidence or to determine a fact in issue;
 6 (b) the testimony is based on sufficient facts or data;
 7 (c) the testimony is the product of reliable principles and methods; and
 8 (d) the expert has reliably applied the principles and methods to the facts of
 9 the case.

10 Fed. R. Evid. 702. Expert testimony is admissible only if it is relevant and reliable.
 11 *Daubert*, 509 U.S. at 589. Expert testimony is “relevant” if it fits the facts of the case and
 12 logically advances “a material aspect of the proposing party’s case.” *Daubert v. Merrell*
 13 *Dow Pharms., Inc. (Daubert II)*, 43 F.3d 1311, 1315 (9th Cir. 1995). Further, the testimony
 14 is “reliable” if the expert’s opinion is reliably based in the “knowledge and experience of
 15 the relevant discipline.” *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960,
 16 969 (9th Cir. 2013) (quoting *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010)).

17 The trial judge acts as the “gatekeeper” of expert witness testimony by engaging in
 18 a two-part analysis. *Daubert*, 509 U.S. at 592–93. First, the trial judge must determine
 19 that the proposed expert witness testimony is based on scientific, technical, or other
 20 specialized knowledge. *Id.*; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). To
 21 assess reliability, courts may consider “(1) whether the theory can be and has been tested,
 22 (2) whether the theory has been peer reviewed and published, (3) what the theory’s known
 23 or potential error rate is, and (4) whether the theory enjoys general acceptance in the
 24 applicable scientific community.” *Murray v. S. Route Mar. SA*, 870 F.3d 915, 922 (9th
 25 Cir. 2017). Second, the trial court must ensure that the proposed testimony is
 26 relevant—that it “will assist the trier of fact to understand or determine a fact in issue.”
 27 *Daubert*, 509 U.S. at 592. The Rule 702 inquiry is flexible and must focus “solely on
 28 principles and methodology, not on the conclusions that they generate.” *Id.* at 595. “[I]t is a matter for the finder of fact to decide what weight to accord the expert’s testimony” after it has passed the two-part analysis to determine its admissibility. *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230 (9th Cir. 1998). Opposing experts or tests that the factfinder may be confronted with do not preclude admission but rather go to the weight of the

1 evidence. *Id.* at 1230–31. “Vigorous cross-examination, presentation of contrary
 2 evidence, and careful instruction on the burden of proof are the traditional and appropriate
 3 means of attacking shaky but admissible evidence.” *Daubert*, 509 U.S. at 596.

4 **II. DISCUSSION**

5 The parties are familiar with the background of this case and the Court will include
 6 background where relevant to the analysis. (*See generally* Doc. 332 (providing background
 7 at summary judgment).)

8 USI retained Mr. Kotzin to provide an expert opinion on economic damages
 9 generally pertaining to lost clients allegedly caused by Defendants. (*See* Doc. 270-1 (Mr.
 10 Kotzin’s Expert Report).) The alleged wrongful conduct that remains for trial generally
 11 includes solicitation of USI’s clients, tortious interference with contract and business
 12 expectancies, and failure to provide advance notice of resignations from USI. (*Id.*; *see also*
 13 Doc. 332.) Mr. Kotzin’s opinion assesses the total economic damages in this case under
 14 two inquiries: first, the combined value of Havard and Engles’ books of business based on
 15 their fair market value; and second, the diminution of value to the commercial lines
 16 segment of USI’s Phoenix office. (Doc. 270-1 at 4.) In the end, he opines that to put USI
 17 in the same financial and economic position it would have been in but-for the alleged
 18 wrongful conduct, the diminution of value represents the appropriate damages, which is
 19 greater than the fair market value he calculated for the books of business. (*Id.*)

20 Defendants challenge Mr. Kotzin’s opinion on multiple grounds. (*See generally*
 21 Doc. 263.) Regarding the valuations for the books, Defendants first contend that Mr.
 22 Kotzin improperly considered irrelevant assets. (Doc. 270 at 9–12.) Second, Defendants
 23 argue that he improperly relied on unverifiable multiples to reach the total damages for
 24 both the books and diminution of value opinions. (*Id.* at 12–15.) Next, Defendants fault
 25 both opinions for purportedly using inconsistent approaches to calculating the normalized
 26 income for Havard and Engles, which impacted the final calculations for the EBITDA of
 27 their books. (*Id.* at 15–16.) Last, Defendants argue Mr. Kotzin relied on an irrelevant
 28

1 “platform” multiple to reach the diminution of value opinion. (*Id.* at 16–17.)²

2 **A. Valuation of Assets**

3 To ascertain the value of a book of business, Mr. Kotzin’s Expert Report notes the
 4 standard of value is fair market value, which generally involves determining the price at
 5 which property would change hands between willing buyers knowing the relevant facts.
 6 (*Id.* at 15.) Mr. Kotzin further notes that the value of a book business includes “all of the
 7 valuable intangible assets and goodwill associated” and these assets include “client
 8 relationships,” “continued patronage, the assembled workforce, know-how, and
 9 competitive advantage.” (*Id.*) He also notes that a damages methodology that fails to
 10 account for this value would not place USI in the same financial or economic position it
 11 would have been in but-for the wrongful conduct. (*Id.*)

12 Defendants challenge the relevance of including these assets in the valuation of the
 13 books of business based on the circumstances of this case. According to Defendants, USI
 14 is attempting to recover lost values that it was never entitled to because the Individual
 15 Defendants were at-will employees. (*See* Doc. 270 at 9–12 (citing *Simmons v. USI Ins.*
 16 *Servs.*, LLC, 721 F. Supp. 3d 1333 (M.D. Fla. 2024)); Doc. 323 at 6–7.) In turn, USI argues
 17 that under a market approach methodology, Mr. Kotzin quantified the value of the books
 18 of business that USI would have expected to retain had the Defendants not breached their
 19 contractual and common law duties, and what USI could have obtained in selling those
 20 books on the open market. (Doc. 302 at 3–5.) To that end, USI contends including these

22 ² Defendants additionally argue that his opinion should be excluded because he failed to
 23 apportion the damages according to the relevant claims and appropriate defendant. (*Id.*
 24 at 17–18; Doc. 323 at 9–10.) Mr. Kotzin’s opinion assumes liability. (Doc. 270-1 at 3.)
 25 He has further indicated that, if the jury were to find only one defendant liable, he has
 26 adequate data from his Expert Report to apportion damages. (Doc. 309-2 ¶ 5; *see also* Doc.
 27 309 at 12–13.) In pointing to their summary judgment arguments, Defendants also argue
 28 that Arizona’s economic loss rule bars recovery for tortious interference claims based on
 the same facts as the breach of contract claims. (*See* Doc. 323 at 1; *see also* Doc. 319.)
 First, Defendants improperly raise this argument for the in their Reply brief. (*See generally*
 Doc. 270.) Second, Defendants inadequately briefed the issue at summary judgment and
 did not address the issue with respect to a claim against Alliant for tortious interference
 with contract at all, as opposed to a claim against the Individual Defendants for tortious
 interference with business expectancies. (*See* Doc. 332 at 34–35.) Therefore, the Court
 finds Mr. Kotzin’s purported failure to apportion is not a basis to exclude his opinion at
 this time.

1 assets in the value of the books of business is relevant. (*Id.*)

2 Defendants heavily rely on *Simmons* to support their irrelevancy arguments, but the
 3 case is inapplicable. There, applying Florida law, the district court excluded USI's expert's
 4 opinion on the fair market value of lost accounts or the lost books of business. *See*
 5 *Simmons*, 721 F. Supp. 3d at 1342. The court rejected USI's argument that its proposed
 6 fair market value model is a viable method of calculating lost profits for the loss of specific
 7 accounts because the model included measuring "something more than the stream of profits
 8 arising from the specific accounts that left USI." *See id.* at 1342–43. The court further
 9 reasoned that USI sought to recover damages attributable to the defendants' skills, services,
 10 and client relationships but that the defendants were under no obligation to remain with the
 11 company. *Id.* at 1343–44. As such, it further reasoned, an award would put USI in a better
 12 position than it otherwise would have been in by awarding the value of the defendants as
 13 employees as a component of damages. *Id.* at 1343–44.

14 The *Simmons* court was seemingly concerned with the issue of whether the fair
 15 market value that included the intangible assets could fold into a lost profits analysis. *See*
 16 *id.* at 1343. Defendants do not point to any authority that a fair market valuation is an
 17 inappropriate measure of damages in Arizona. (*See* Doc. 323 at 7.) As they acknowledge,
 18 the appropriate measure of damages for breaches of contract under Arizona law are those
 19 that arise naturally from the breach itself. *See All Am. Sch. Supply Co. v. Slavens*, 609 P.2d
 20 46, 48 (Ariz. 1980). And underpinning the alleged breach of a non-solicitation provision,
 21 an employer retains legitimate interest in maintaining its customer base, i.e., it is an asset
 22 of value in the employer's view. *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1284
 23 (1999) (noting these types of restrictive covenants prevent an employee from luring away
 24 customers while an employer is vulnerable). Although the *Simmons* court held market
 25 value was unavailable under Florida law, other courts have held that market value is an
 26 appropriate and reasonable damages calculation. *See USI Ins. Servs., LLC v. Aitkin*, No.
 27 3:21-cv-00267-HZ, 2022 WL 4364882, at *2 (D. Or. Sept. 21, 2022); *USI Ins. Servs., LLC*
 28 *v. Tillman*, 4:23-CV-00054-LGW-CLR (S.D. Ga. Oct. 17, 2024), Dkt. No. 148 at *11–12.

1 In assuming liability, Mr. Kotzin considers USI’s allegations that Defendants either
 2 breached the 60-day notice or non-solicitation provisions in their employment agreements
 3 or tortiously interfered with such obligations. (Doc. 270-1 at 3.) Mr. Kotzin’s
 4 consideration of the intangible assets, like client relationships and goodwill, cover the
 5 damages that flow from a breach of these provisions. While these contractual obligations
 6 do not carry forward in perpetuity, the jury may assign a damages figure that appropriately
 7 reflects the damages USI suffered during the time the provisions would have been
 8 enforceable had Defendants not breached their obligations. Thus, the Court declines to
 9 exclude Mr. Kotzin’s testimony on this ground.

10 **B. Market Multiples**

11 In arriving at his opinion on total damages, Mr. Kotzin applied two multipliers to
 12 the calculated lost EBITDA to reach a total valuation relative to the loss of Havard and
 13 Engles’ books of business. (*See* Doc. 270-1 at 21, 52, 65–66.) Mr. Kotzin derived the
 14 multiples from the MarshBerry Report, which provided him with average purchase prices
 15 as a multiple of EBITDA for various years that MarshBerry sourced from a database and
 16 compiled from transactions it was directly involved in, had detailed information for, or
 17 were in the public record. (*See* Doc. 303-2 at 32; Doc. 303-3 at 9.)

18 The first multiple at issue was part of Mr. Kotzin’s analysis of “the guideline
 19 transaction method under the market approach.” (Doc. 2701-1 at 19, 65–66.) Mr. Kotzin
 20 chose the applicable multiple from a variety of reports and multiples, finding that was most
 21 relevant to the valuation. (*See* Doc. 303-1 at 5, 6, 9–10, 13.) He explained that this multiple
 22 and the underlying transactions accounted for their size, roll-ins of potential books of
 23 business, realistic earn-outs rather than totals, and were more comparable to the sale of a
 24 book of business. (*See id.*)

25 The second multiple relates to Mr. Kotzin’s alternative methodology that
 26 determined the diminution of value to the commercial lines segment of USI’s Phoenix
 27 office, which applied a greater multiple than the guidelines transaction method. (Doc.
 28 2701-1 at 20, 65.) As Mr. Kotzin did for the guideline transaction method, he reviewed

1 but rejected many of the other multiples and found a “platform” multiple was more
 2 appropriate because the sale of the commercial lines segment would involve the sale of
 3 assets other than just a book of business. (Doc. 303-1 at 9–11.) Mr. Kotzin explained that
 4 the higher multiple accounts for the larger size of the transaction, revenue, and profitability
 5 of USI’s Phoenix office compared to rolling in a book of business. (*Id.* at 8–11.)

6 Defendants claim that Mr. Kotzin did not support his multiples with verifiable facts
 7 or data. (Doc. 270 at 12–14.) According to Defendants, Mr. Kotzin relied on ranges that
 8 he received from discussions with USI’s industry expert, Thomas R. Linn, and from relying
 9 on a “MarshBerry Report.” (*Id.*; *see also* Doc. 359.) Defendants posit that neither source
 10 identifies, discloses, or describes any of the underlying transactions that informed the
 11 multiples. (Doc. 270 at 14; Doc. 323 at 2–4.) USI argues that Mr. Kotzin analyzed
 12 EBITDA multiples from various reports “produced by preeminent insurance M&A firms,”
 13 which USI produced to Defendants, and the MarshBerry Report offered appropriate detail
 14 regarding the underlying multiples to justify his reliance on the data. (Doc. 302 at 6–8 &
 15 n.7; *see also* Doc. 302-1 at 11, 15, 17, 18, 19; Doc. 303-1 at 10–13.)

16 Defendants complain that do not have access to the relevant data and criticize Mr.
 17 Kotzin for not verifying the data underlying those reports during his deposition. (*See* Doc.
 18 323 at 4.) Defendants do not appear to contend that the MarshBerry Report or any of the
 19 other reports that Mr. Kotzin considered themselves are unreliable or that relying on similar
 20 market data is improper in the first place. *See* Fed. R. Evid. 703 (“An expert may base an
 21 opinion on facts or data in the case that the expert has been made aware of or personally
 22 observed. If experts in the particular field would reasonably rely on those kinds of facts or
 23 data in forming an opinion on the subject, they need not be admissible for the opinion to
 24 be admitted.”). Defendants seem to argue that Mr. Kotzin’s choice of multiplier is
 25 unreliable because he based in on discussions with Mr. Linn. But Mr. Kotzin did not solely
 26 rely on that information. (*See generally* Doc. 359 (excluding Mr. Linn from opinion on a
 27 specific range of multiples because he failed to identify the underlying transactions data
 28 that supported his opinion).) Mr. Kotzin testified that he reviewed a variety of other reports

1 and their underlying data that provided varying multiples but he concluded the MarshBerry
 2 was more comparable under each methodology. (*See* Doc. 303-1 at 5, 6, 9–10, 13.)

3 Additionally, Defendants contend that they were deprived of the ability to explore
 4 the reliability of the MarshBerry Report and Mr. Kotzin’s reliance on it because it was
 5 disclosed after discovery closed. (*See* Doc. 270 at 15 n.1.) But as USI indicates, USI
 6 timely produced Mr. Kotzin’s Expert Report and each of the underlying reports before
 7 Defendants deposed Mr. Kotzin. (*See* Doc. 302 at 7 n.6.) USI further notes that Defendants
 8 did not introduce any of the reports during his deposition. (*Id.*) Defendants’ failure to
 9 delve into the various reports that Mr. Kotzin reviewed may be further explored during
 10 cross examination at trial. This failure is not a basis for the Court to find he did not base
 11 his opinion on sufficient facts or data and the reliability of the market data in the reports is
 12 not reasonably in question. Likewise, Defendants have not provided the Court with an
 13 adequate basis to conclude that Mr. Kotzin’s reliance on these market reports render his
 14 opinion unreliable or based on insufficient data. Therefore, the Court declines to exclude
 15 Mr. Kotzin’s opinion on this ground.

16 **C. Normalized Income Calculations**

17 To calculate the EBITDA figures that informed Mr. Kotzin’s guideline transaction
 18 and diminution of value damages figures, Mr. Kotzin derived Havard and Engles’
 19 “normalized lost income.” (*See* Doc. 270-1 at 52–54.) For Havard, Mr. Kotzin projected
 20 this figure based on Havard’s five-year average for revenue production. (*Id.*) For Engles,
 21 he used Engles’ 2022 revenue production only. (*Id.*)

22 Defendants argue that Mr. Kotzin cherry-picked different figures for Havard and
 23 Engles to reach the highest possible normalized lost income and EBITDA, rendering his
 24 opinion as based on inconsistent approaches and thus unreliable. (Doc. 270 at 15–16.) USI
 25 counters, arguing that Mr. Kotzin testified to a technically sound decision to evaluate
 26 Havard and Engles separately based on differences in their revenue streams, reoccurring
 27 nature of their clients, and books of business generally. (Doc. 302 at 8–10.) Defendants
 28 do not appear to address this argument in reply. (*See generally* Doc. 323.)

1 As USI points out, Mr. Kotzin adequately explains his rationale for treating Havard
 2 and Engles differently. Mr. Kotzin explained that Engles' clients typically renewed their
 3 policies on an annual basis and that his historical revenues showed linear increases
 4 year-over-year. (*See* Doc. 302-1 at 4–5; Doc. 303-1 at 3–4; Doc. 270-1 at 52.) He further
 5 explained that based on the linear trajectory and reoccurring income, he utilized the
 6 previous twelve months of revenue for a more accurate valuation and would have used the
 7 same approach even if the trajectory showed a decrease in revenues. (Doc. 303-1 at 3–4.)
 8 Conversely, Mr. Kotzin explained that Havard's revenue production varied year-to-year
 9 and his clients purchased policies that varied in length. (*Id.*; Doc. 302-1 at 4–5; Doc. 270-1
 10 at 52.) Additionally, he explained that Havard's clients may not renew a particular policy
 11 at the end of the term but the client would have a continuing need for additional policies
 12 that were written separately. (Doc. 302-1 at 4–5.) Defendants' characterization of Mr.
 13 Kotzin choosing to evaluate Havard and Engles' revenue streams differently as
 14 cherry-picking is therefore not accurate. The Court declines to exclude his opinion on this
 15 ground.

16 **D. The “Platform” Multiple**

17 As previously noted, Mr. Kotzin used a “platform” multiple to inform his analysis
 18 for the diminution of value damages. Essentially, Mr. Kotzin used this analysis to quantify
 19 the damaged based on how the losses of Havard and Engles' EBITDA impacted the overall
 20 value of the USI's Phoenix office in a hypothetical sale. (*See* Doc. 270-2 at 43.) Mr.
 21 Kotzin defined an acquisition involving a “platform” as a “high level transactions for a
 22 buyer, typically due to new geography niche, expertise, size, talent, ect.” (*See* Doc. 270-1
 23 at 20 n.14 (citation modified).) His Expert Report further notes a “platform acquisition
 24 was deemed most relevant indication for the diminution of value calculation based on
 25 discussions with [Linn].” (*Id.* at 65 n.3.)

26 Defendants contend that Mr. Kotzin's use of this “platform” multiple does not fit
 27 the facts of this case and is irrelevant because it values the entire Phoenix office rather than
 28 just a book of business. (Doc. 270 at 16–17; Doc. 323 at 10–11.) Defendants also argue

1 that Mr. Kotzin's did not review the data on the size of the transaction underlying the
2 MarshBerry Report "platform" multiple but that his determination on what multiple applies
3 accounts for the relative size of an acquisition. (See Doc. 323 at 11.) USI argues that USI
4 appears to misunderstand the scope of Mr. Kotzin's analysis, in that he is not valuing the
5 Phoenix office from Alliant's perspective but that of what a willing buyer would pay. (Doc.
6 302 at 10–11.)

7 Defendants' characterization of Mr. Kotzin's opinion is not entirely accurate. He
8 testified that, while he did not consider the specific data for the acquisitions underlying the
9 MarshBerry "platform" multiple, he reviewed specific data with respect to the size of
10 acquisition contained in other reports that corroborated the MarshBerry multiple. (See
11 Doc. 270-2 at 59.) Finally, with respect to the fit, the "platform" multiple enabled Mr.
12 Kotzin to reach the impact the loss of Havard and Engles' books of business had on the
13 overall value of USI's Phoenix office and would tend to make USI whole from that
14 perspective. It's an alternative method of calculating damages. The damages figure under
15 this method is much higher but the jury may determine that this measure of damages is
16 inappropriate to compensate USI for its losses. Defendants' criticisms are best dealt with
17 on cross-examination. Therefore, the Court declines to exclude Mr. Kotzin's opinion on
18 this ground.

19 **III. CONCLUSION**

20 Accordingly,

21 **IT IS HEREBY ORDERED** denying Defendants' Motion to Exclude Certain
22 Trial Testimony and Opinions of Lynton Kotzin (Doc. 263; Doc. 270).

23 Dated this 30th day of June, 2025.

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Honorable Susan M. Brnovich
United States District Judge

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